NO. 20235

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA CIPRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

---

APPELLANT'S OPENING BRIEF

MORRIS LAVINE
215 West 7th Street
Los Angeles, California 90014

Attorney for Appellant Ramona Cipres

TOPICAL INDEX

APPENDIX

TABLE OF AUTHORITIES CITED

STATUTES

NO. 20235

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA CIPRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

---

APPELLANT'S OPENING BRIEF

This appeal is from a decision of the District Court on remand of this case for further proceedings in accordance with the opinion of this Court, rendered March 18, 1965, which decision is attached hereto, marked Appendix A, and made a part hereof. This appeal is in accordance with Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).

The issues raised by this appeal are:

1. "The court must determine from all the circumstances whether the verbal assent reflected an

understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld." (Opinion, p. 3)

2. Whether at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, and that removal of the evidence was threatened.

3. Whether the ruling of the court below, in refusing to compel the government to name the informer in order to determine whether that informer was trustworthy or could or did supply reliable information, was prejudicial error.

JURISDICTION

Jurisdiction is conferred by Title 21, Section 176a and by Title 28, Section 2107, U.S. Codes, and by the order of this Court in case entitled Ramond Cipres v. United States of America, No. 19217, decided March 18, 1965 and remanding the case to the District Court for further proceedings in accordance with the opinion rendered by this Court on March 18, 1965. (Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963))

STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Title 21, Section 176a, United States Code:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States

marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

"For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954."

STATEMENT OF FACTS

The facts are contained in the previous brief and are supplemented by the facts set forth below.

The court held a hearing on the issues herein on May 18, 1965, and said hearing is the basis of the reporter's transcript of 130 pages. The court also made findings of fact, in which it found, among other things:

"The Court finds inasmuch as there was no additional evidence presented by the plaintiff to the point that defendant Cipres had not been warned of her constitutional immunity from unreasonable search and seizure, and, in light of all the facts, did not intentionally relinquish a known right and privilege."

The court also found that the search by the

Customs' agent and police sergeant at the Los Angeles International Airport on September 17, 1963 was at all times reasonable and prudent and further found "from all evidence in the case that at the time the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that defendant Cipres was committing an offense and that removal of the evidence was threatened."

The court further found that the search was valid as incident to a substantially contemporaneous arrest, for the officers had probable cause for the arrest at the time of the search and the circumstances suggested that immediate search was necessary to preserve the material subject to seizure.

The court then concluded that the defendant Cipres was not entitled to relief and that her constitutional rights were not violated.

There was no finding on the question of the informant.

During the course of the hearing the government placed on the stand Neal Ellsworth Greppin to testify, as a Customs' agent, that he worked with Sgt. Beckman of the Los Angeles Police Department. His testimony related solely to Juan Montes DeOca, a

co-defendant. Greppin testified that he received his information from a reliable informant (R.T. 26) and that the reliable informant would not include an anonymous letter that came to the office in San Diego. (R.T. 26)

"Q. What, sir, were the name or names of the reliable informants who gave you information relating to Mr. DeOca?

The government objected and the court said:

"Here is a defendant, or here are two defendants, who claim that the arrest was unlawful, the search was illegal. The only way to justify the search of the arrest seems to me is by probable cause. He says one of the items of probable cause is an informant, a reliable informant. I think the witness has correctly testified that a reliable informant is one who has previously given information which they found to be reliable. It seems to me that the question 'Who was this man' is a perfectly legitimate question...

"THE COURT: This question has arisen on numerous occasions and I have known of instances where the government has dismiss-

ed rather than reveal the name of the confidential informant. But my information is that the government has always been required to reveal the name.

"MR. VAN DE KAMP: I don't believe that is completely accurate, your Honor."

The court requested government counsel to produce any citations and after further argument and on the basis of U.S. v. Rugendorf, 316 F.2d 589, the court sustained the objections of the government to giving the defense the name of the informer, although the court quoted from Roviaro v. United States, 353 US 53.

SPECIFICATION OF ERRORS

Appellant specifies the following errors on appeal:

1. The court erred in holding that the appellant's constitutional rights were not violated.

2. The court erred in holding that at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in beliving that Cipres was committing an offense or had any guilty knowledge that any offense was committed and that removal of

the evidence was threatened.

3. The court erred in holding that the government did not have to disclose the name of the informant without collaterally dismissing the case and discharging appellant.

ARGUMENT

I

THE COURT ERRED IN HOLDING THAT THE APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

The court correctly found from all the circumstances in the case that the defendant Cipres had not understandingly, uncoerced and unequivocally elected to grant the officers a license which she knew could be freely and effectively withheld.

This point was conceded by the government and found by the court below in favor of the defendant.

II

THE COURT ERRED IN HOLDING THAT AT THE MOMENT THE BAGS WERE SEARCHED THE OFFICERS HAD REASONABLY TRUSTWORTHY INFORMATION OF FACTS SUFFICIENT TO WARRANT A PRUDENT MAN IN

BELIEVING THAT CIPRES WAS COMMITTING AN OFFENSE OR HAD ANY GUILTY KNOWLEDGE THAT ANY OFFENSE WAS COMMITTED AND THAT REMOVAL OF THE EVIDENCE WAS THREATENED.

The court held that at the moment the bags were searched the officers had reasonably trustworthy information of facts to believe that Cipres was committing an offense. Here she was at the airport, covered with the presumption of innocence. There was at that moment no evidence that she at any time had any knowledge that she was committing any offense or that she had any knowledge that any offense was being committed.

There was nothing to show that she had any knowledge of the contents of the bags at any time. Guilty knowledge of their contents was just as essential to establishing that she was committing an offense as any other fact sufficient to warrant a prudent man in believing that she was committing an offense.

She was in no different position than the defendant in People v. Gory, 28 Cal.2d 450, 170 P.2d 433, where the defendant, in a prison camp, did not know the contents of a bag and there was no showing

of any guilty knowledge of its contents. That Cipres was arrested prior to any search is shown by the evidence that the officers were detaining her and questioning her and that the contents of the bags was not known was clearly shown by the officer trying to smell the contents to speculate by an odor which he claimed was familiar to him, namely, that of marijuana. The other bag was subsequently opened at the airport. Both bags, although unlocked, required inspection and examination to determine their contents, although at the very moment that Cipres was arrested the officer did not have any reasonable or any trustworthy information sufficient to warrant a prudent man in believing she was committing an offense, and that removal of the evidence was threatened.

III

THE COURT ERRED IN HOLDING THAT THE GOVERNMENT DID NOT HAVE TO DISCLOSE THE NAME OF THE INFORMANT WITHOUT COLLATERALLY DISMISSING THE CASE AND DISCHARGING APPELLANT.

The refusal of the government to disclose the informer's identity in the light of the thinness

of the government's case requires a reversal.

Secrecy cannot be maintained where disclosure is necessary to a fair trial.

Roviaro v. United States, 353 US 53, 1 L.ed.2d 659

In the Roviaro case, the court said:

> "Where the disclosure of an informant's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way."

In Roviaro, as here, the petitioner was charged with a narcotic violation. In the Roviaro case it was the sale. An unidentified informant was supposed to have given the information. The testimony of the narcotics agents and police officers, who by prearrangement with the unnamed informer followed petitioner and the informer and observed the transaction, while seemingly conclusive of guilt, brought about a reversal of the conviction for refusal to compel disclosure of the informer's name and address.

The identity of the informer as reliable in this case likewise became important. The right of

the defendant to produce evidence which would show that the informer was not reliable and that the officers did not have any basis for their search from a reliable informer is certainly a necessary part of the defense in this case and deprived the defendant of fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Brady v. Maryland, 373 US 82, 10 L.ed.2d 215

The search cannot be justified by what is turned up at the search.

Silverthorne Lumber Co. v. United States, 251 US 385, 64 L.ed. 319

In Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, an informer told the police that the defendant had narcotics. The officers went to the apartment and arrested the man, without a warrant, and searched the apartment, finding drugs. The court there said:

> "If testimony of communications from a confidential informer is necessary to establish the legality of the search, the defendant must be given a fair opportunity to

rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's acts depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

(50 Cal.2d at 818)

It is therefore apparent that:

(1) There was no waiver on the part of the defendant to a search and to a seizure, both being

separate elements requiring consents.

Boyd v. United States, 116 US 616, 29 L. ed. 746

Takahashi v. United States, 143 F.2d 118

(2) There was no reasonable or probable cause to believe that this defendant was committing a felony or that she had any guilty knowledge of the contents of the bags at the time of her arrest.

(3) Both the search and the seizure were conducted without a warrant and without probable cause subsequent to the arrest.

(4) Defendant was deprived of an opportunity to determine probable cause from the refusal of the government to reveal the identity of the informer and, having elected to refuse to identify the informer, the defendant is entitled to a dismissal.

United States v. Coplon, 191 F.2d 749

CONCLUSION

WHEREFORE, defendant prays that the judgment be reversed and that the evidence be ordered suppressed as to her and that the indictment be ordered dismissed as to her in the light of the unlawful search and seizure and in the light of the election

of the government not to reveal the name of the informer.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant
Ramona Cipres

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morris Lavine
Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA CIPRES and JUAN MONTES DeOCA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

[Mar. 18, 1965]

Appeal from the United States District Court
for the Southern District of California
Central Division

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Ramona Cipres and Juan Montes DeOca appeal from convictions for trafficking in marihuana contrary to 21 U.S.C.A. § 176(a).

I

Appellants argue that the district court erred in admitting into evidence two suitcases containing marihuana, contending that the evidence was secured by conduct violating Cipres' Fourth Amendment right to freedom from unreasonable search and seizure.

The marihuana was discovered and seized at the

Los Angeles International Airport by a Customs agent and an officer of the Los Angeles Police Department. Their testimony relevant to the search and seizure was as follows: In September 1963, a man known to be engaged in narcotics traffic between Los Angeles and New York City checked in at a Los Angeles hotel under the assumed name of "Martinez." The airline companies were asked to advise the authorities of any reservations made in that name. On September 17, American Airlines informed the Customs Service that such a reservation had been made for an evening flight to New York City. The Customs agent and the police officer stationed themselves near American Airlines' check-in counter. Shortly before the scheduled departure time of the flight a car drove up to the adjacent curb and both appellants alighted. The Customs agent recognized DeOca as a person he had investigated earlier for possible involvement in narcotics traffic. DeOca took two suitcases from the car trunk, set them on the curb, returned to the car, and drove off. A porter took the bags to the check-in counter and set them on the scale. Cipres followed. The Customs agent observed that the bags weighed 140 pounds, and heard Cipres ask for a

reservation in the name "Martinez." The officers identified themselves to Cipres, told her they were conducting a narcotics investigation, and wished to talk with her. In response to their questions, she told them her name was Cipres, but that she sometimes used the name Martinez in traveling. She said the bags contained clothing, but added, in explanation of their weight, that they also contained cosmetics. The officers told Cipres they suspected the bags contained marihuana. She denied it. They asked if they could search the bags. She answered, "Yes, I have nothing to hide," but added that she had left the keys in New York City. They examined the bags and found them unlocked. The Customs agent opened the bags, discovered the marihuana, and arrested Cipres.

Cipres denied consenting to the search. She testified that the officers accosted her and asked about the contents of the bags. She asked if they had a search warrant, but they simply proceeded to open the bags. The officers admitted that Cipres asked if they had a search warrant, but only after the Customs agent had opened the bags with her permission and discovered the marihuana.

The District court treated the issue as simply

whether or not Cipres told the officers they might search the suitcase. Seeing "no reason why I should disbelieve the testimony of the two officers," the court admitted the evidence.

But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the persons known may be freely and effectively withheld.[1] We recently sustained a district court finding that such waiver was lacking despite an express verbal consent,[2]

---

1. See generally, Comment, 113 U. Pa. L. Rev. 260 (1964)

2. Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), affirming Application of Tomich, 221 F.Supp. 500 (D. Mont. 1963).

and such cases are common.[3] They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.[4]

Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it

---

3. See, e.g., United States v. Marrese, 336 F.2d 501, 504 (3d Cir. 1964); Pekar v. United States, 315 F.2d 319, 324-25 (5th Cir. 1963); Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962); Channel v. United States, 285 F.2d 217, 219 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954); Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953); Catalanotte v. United States, 208 F.2d 264, 268 (6th Cir. 1953); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also Greenwell v. United States, 336 F.2d 962, 967-68 (D.C. Cir. 1964).

4. Manwaring, 16 Stan. L. Rev. 318, 334-35 (1964).

was obtained "under color of the badge" and therefore presumptively coerced;[5] it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual;[6] it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened;[7] and admittedly Cipres asked if the officers had a search warrant.

Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present

---

5. United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962).

6. Application of Tomich, supra, note 1, 221 F. Supp. at 503.

7. Channel v. United States, 284 F.2d 217, 221 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962). But see Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964), vacated and remanded ___ U.S. ___ March 15, 1965).

record or after such further hearing as the court may deem appropriate.[8]

As we have noted, Cipres was arrested immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure.[9]

---

8. See Martinez v. United States, ___ U.S. ___ (March 15, 1965); Rios v. United States, 364 U.S. 253, 260-62 (1960); Masiello v. United States, 304 F.2d 399, 401 (D.C. Cir. 1962); United States v. Page, 302 F.2d 81, 86 (9th Cir. 1962).

9. Dickey v. United States, 332 F.2d 773, 778 (9th Cir. 1964); Fernandez v. United States, 321 F.2d 283, 286-87 (9th Cir. 1963); Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961). See also United States v. Haley, 321 F.2d 956, 958 (6th Cir. 1963). Compare Mosco v. United States, 301 F.2d 180, 187-88 (9th Cir. 1962); Shadoan, Law and Tactics in Federal Criminal Cases 67 (1964); Collins, 50 Cal. L. Rev. 421, 441-42 (1962); Manwaring, 16 Stan. L. Rev. 318, 344-46 (1964); Orfield, 24 La. L. Rev. 665, 681, 82 (1964). The Supreme Court has reserved the question. Ker v. California, 374 U.S. 23, 42-43 (1963). See also Stoner v. California, 376 U.S. 483 (1964).
It has been suggested that since the rule has been applied only where there were reasonable grounds to believe that imminent destruction or removal of material subject to seizure was threatened (prior to

Thus the inquiry would be whether at the moment the bags were searched [10] the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, [11] and that removal of the evidence was threatened. [12] But these also are questions of fact to be decided initially by the district

---

the searches in Busby and Haley the officers saw, and in Fernandez smelled, probable contraband in temporarily stopped automobiles, in Dickey, a probable possessor of narcotics was moving toward a bathroom), and hence is merely an application of the accepted principle that the Fourth Amendment does not preclude a search without a warrant in such "exigent circumstances" exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (United States v. Ventresca, ___ U.S. ___ n. 2 (March 1, 1965); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 14 (1948)), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal or destruction.

10. Of course, nothing disclosed by the search could be considered to justify the arrest. United States v. Di Re, 332 U.S. 581, 595 (1948).

11. This accepted definition or probable cause for arrest was most recently restated by the Supreme Court in Beck v. Ohio, 379 U.S. 89, 91 (1964). The "reasonable grounds" to believe that an offense is being committed, authorizing a Customs agent to make an arrest without a warrant under 26 U.S.C.A. §7607 (2) is the equivalent of Fourth Amendment 'probable cause." Wong Sun v. United States, 371 U.S. 471, 478 n. 6 (1963).

court. That court has not yet done so; having found that Cipres "consented" to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U.S.C.A. §482.[13] To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand.

II

The appellant's remaining specifications of error are insubstantial.

1. It is true, of course, that proof of mere proximity to the drug would be insufficient to establish actual or constructive "possession" within the meaning of 21 U.S.C.A. §176(a).[14] However, the testimony regarding Cipres' responses to the officers' inquiries as to contents of the bags, plus the

---

12. In addition to other facts recited earlier, it appeared that one of the bags had been placed on the airline conveyor belt.

13. See Romero v. United States, 318 F.2d 530 (5th Cir. 1963).

14. Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

natural inferences from the evidence as to the placement and movements of Cipres and the suitcases, afforded an adequate basis for the jury's determination that the luggage was in Cipres' immediate physical custody or subject to her dominion and control. Indeed, she testified to as much at the trial, offering an innocent explanation of a possession she did not deny.

2. No argument was offered in support of Cipres' specification of error asserting an insufficiency of proof of knowledge that the bags contained marihuana. Nonetheless, we have satisfied ourselves that the jury could properly infer guilty knowledge from evidence of record which, in the circumstances, we will not pause to detail.

3. Read in context, the trial court's comments upon the evidence, which Cipres suggests were inaccurate, were of minor importance. The court carefully instructed the jury that it was the sole judge of the facts and that the court's comments might be disregarded. No exception was taken at trial to the portions of the charge which Cipres now attacks. "We can find no plain error therein affecting the substantial rights of the appellants, nor can we

find any error which would result in a manifest miscarriage of justice." Gilbert v. United States, 307 F.2d 322, 327 (9th Cir. 1962).

4. We find no plain error in government counsel's closing argument.

5. Finally, appellant De Oca's argument that evidence concerning a second seizure of marihuana should have been suppressed as the product of the assertedly illegal prior seizure discussed above cannot be sustained. There is nothing in the record to indicate that the two seizures were related.[15] Appellant DeOca made no suggestion in the trial court that the evidence be suppressed or excluded as tainted by the earlier seizure, or for any other reason.[16]

Remanded for further proceedings in accordance with this opinion.[17]

---

15. Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958).

16. Westover v. United States, ___ F.2d ___ (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); compare Henry v. Mississippi, ___ U.S. ___ (1965).

17. Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).